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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

HOYT WEAVER,
PETITIONER

-VS-

ROBERT GRAHAM,
GOVERNOR OF FLORIDA,
RESPONDENT

CASE NO. 79-5780

TRAVERSE TO RESPONDENT'S BRIEF

OR; IN THE ALTERNATE

MOTION TO STRIKE

- I -

Article II, Section 9, relative to the powers of the Congress of the United States

> "No bill of attainder or ex post facto law shall be passed."

In Article II, Section 10, The Constitution of The United States holds that "No state shall.....pass any bill of attainder, ex post facto law or law impairing the right of contracts....."

Petitioner would first show that the question before this Court, as before the Florida Supreme Court, goes solely to Section (1) of Florida Statute 944.275 reducing gain time for good behavior as is reflected by the record. The Response does not so designate the question (Response page one). Likewise, the Response overlooks Article II, Section 10 of the United States Constitution cited above and in the original petition. Finally, as the record reflects, Respondent may not claim that the validity of 944.275 (1) is at issue in that Petitioner has made no such claim; - merely that it may not be applied to Petitioner.

- II -

Respondent, for some reason of his own, argues only that the Florida Parole Commission is a Constitutional Agency. Such has absolutely no bearing upon the issues presented here unless Respondent is trying to mislead the Court into believing that Parole and Statutory Gain Time are the same.

- III -

Parole is granted by a Parole Commission. Parole is not required and any prisoner may decline a parole since parole is in the nature of a legal contract and need not be accepted.

Statutory Gain Time is aimed solely and completely at Mandatory Conditional Release which is a matter of law and must be accepted. A prisoner may not refuse it.

Parole and Mandatory Conditional Release are neither interdependent nor connected in any matter whatsoever, whatever the basis of parole, be it Legislative or Executive. Moreover, parole is not here at issue and bears absolutely no weight in the present matter.

Statutory Gain Time is a creature of the Legislature and must be given when earned. It may not be withheld except for infractions of the Prison Rules. Even then, it may only be taken in amounts fixed by law and a Disiplinary Report and Hearing is indispensible for its taking.

For these reasons, Court need not inquire as to the Florida Parole System since it is not here at issue so it matters not at all whether the Parole System of Florida is Executive or Legislative and that part of the Response should be stricken as irrelevant, immaterial and frivolous.

- IV -

The question before this Court:

> Where a Statute is enacted after the commission of an offense which materially alters the situation of the accused to his material disadvantage is the application of such Statute to the accused ex post facto?

It is necessary only to consider the following:

> The offense in the instant case occurred in 1976. The effective Statute (944.27) at that date:
> (1) The Department of Offender Rehabilitation shall grant the following deductions for gain time...
> (A) 5 days per month off the first and second years of the sentence;
> (B) 10 days per month off the third and fourth years of the sentence; and
> (C) 15 days per month off the fifth and all succeeding years of the sentence.

Petitioner was sentenced to a total of fifteen years imprisonment in 1976.

On July 1, 1978, a new Statute (944.275) was enacted:

> (1) The Department of Offender Rehabilitation shall grant the following gain time reductions...
> (A) 3 days per month off the first and second years of the sentence;
> (B) 6 days per month off the third and fourth years of the sentence; and
> (C) 9 days per month off the fifth and all succeeding years of the sentence.

Bluntly stated, the New Gain Time Law (944.275) takes away certain benefits guaranteed by 944.27 at the time of sentencing and therefore adds to the penalty contemplated by the law at time of sentencing; - and is, for that reason, ex post facto as it applies to Petitioner.

- V -

Respondent states that "Curtis is distinguishable" is either in error or is a deliberate mis-statement. Curtis holds:

> "That the law has been changed to the defendant's disadvantage, after commission of the crime, is unquestioned. The pertinent inquiry is whether this type of change, of substantial consequence, is the type of retroactive law which is banned by the ex post facto clause." State v. Curtis, 363 So.2d 1375 at 1379.

Clearly, both Curtis, and instant petition deal with the application of statutory law enacted after commission of the crime, altering the punishment contemplated by law at the time of the commission of the crime. Thus, Curtis, like the other Louisiana cases cited, is on point and should be considered.

Moreover, Respondent's reliance on Greenholtz v Inmates of the Nebraska Penal Complex, ____US____, 99 S Ct 2100, 60 L Ed 2d 668 (1979) is misplaced. In Greenholtz 99 S Ct at 2106 the position of the Court in Wolff v. McDonnell, 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974) protecting gain time for good behavior was affirmed. Here we deal with just such statutory gain time for good behavior (Florida Statute 944.27) not parole, the subject matter of Greenholtz.

We are not at all concerned with Parole, Parole Commissions, or what branch of the State Government controls, although since Respondent attempted to argue that the Parole Commission of

Florida is constitutionally fixed in the Executive, it is here required that Petitioner point out that the provision governing such Parole Commission and paroles, Article IV 8 (c), Florida Constitution, states only:

> (c) There may be created by law a parole and probation commission with power to supervise persons on probation and to grant paroles...(emphasis supplied)

and Respondent is appearing to present the untenable position that the Executive Branch of the Florida Governement can now create laws.

- VI -

The Response is wholly unresponsive in that it does not even touch on the matter here at issue. The Response merely presents a rather rambling account of the history of parole in Florida and then cites cases in which gain time was taken for violations of the rules or conditions applicable in those distinct cases. Not one single case cited applies to the issue here.

Court may take Judicial Notice that the Response fails utterly to deny Petitioner's claim; and, therefore, may be held to agree with the position presented by Petitioner;

And, the Response should be stricken as frivolous.

The Writ should be issued.

Respectfully submitted,

Hoyt Weaver

HOYT WEAVER

CERTIFICATE OF SERVICE

I, Hoyt Weaver, did place a true copy of the foregoing Motion To Expedite and Traverse To Response in the United States Mail this 4 day of March, 1980, directed to Jim Smith, Attorney General of Florida, The Capitol, Tallahassee, Florida.

Hoyt Weaver

HOYT WEAVER

SUBSCRIBED TO AND SWORN
BEFORE ME THIS 4th DAY OF
March 1980

James G. Tilman

NOTARY PUBLIC

JAMES G. TILMAN
Notary Public, State of Fla. at Large

IN THE SUPREME COURT OF THE UNITED STATES

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HOYT WEAVER,
PETITIONER

-VS-

ROBERT GRAHAM,
GOVERNOR OF FLORIDA,
RESPONDENT

CASE NO. 79-5780

IN THE MATTER OF: PETITION FOR WRIT OF CERTIORARI

MOTION TO EXPEDITE

Comes now Hoyt Weaver, Petitioner above named, and presents this Motion to Expedite, showing cause as follows:

1. Petitioner's cause should prevail.
2. The outcome of the present cause will materially affect thousands of persons; all who were convicted of any offenses occurring prior to either July 1, 1978 (the effective date of Florida Statute 944.275) or January 1, 1979 (the date Florida's Department of Corrections decided to implement the cited Statute).
3. Thousands of Florida prisoners are being denied knowledge as to their release date.
4. Hundreds of Florida prisoners are already serving time past their expiration date under Florida Statute 944.27.
5. Every day of delay causes irreparable damage by keeping prisoners past their proper date of release.
6. The cause presents no complicated issues, but, simply stated, asks merely if Florida is permitted to apply an ex post facto law.

Respectfully submitted,

Hoyt Weaver

HOYT WEAVER